Jetara Sdn Bhd v Maju Holdings Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–1177 OF 2005

GOPAL SRI RAM, ZAINUN ALI AND HASAN LAH JJCA

22 MARCH 2007

Civil Procedure — Summary judgment — Appeal — Summary judgment set aside — Building contract — Claim for work done — Whether there were bona fide issues to be tried — Rules of the High Court 1980 O 14

Contract — Building contract — Claim for work done — Sub-contract works — Whether sub-contractor rectified defects — JKR had not issued Certificate of Making Good Defects — Whether parties agreed on final sub-contract sum — Whether such failure justifed refusal to make payment for work done — Unauthorized deductions — Whether respondent had right to make such deductions

The respondent was the main contractor of a project ('the said project'). The appellant was appointed by the respondent as a sub-contractor for the sub-contract works in relation to the said project ('the sub-contract works') pursuant to a letter of award ('letter of award'). The appellant claimed against the respondent for the sum of RM3,017,587.15 being the outstanding amount due and owing by the respondent for all the works done and completed, inclusive of the sum of RM435,161.64 being the retention monies and the sum of RM348,129.31 being the so-called 'unauthorized deduction' by the respondent. The appellant had completed the works for the sub-contract works and a certificate of practical completion had been issued by the Superintending Officer from Jabatan Kerja Raya ('JKR') to the effect that all works for the said project had been completed. The appellant had also rectified all the defects identified by the respondent. The appellant alleged that as a result of the negotiations the appellant had agreed the final sub-contract sum. The respondent disputed the appellant's claim and contended that the total amount to be paid to the respondent could only be ascertained after the respondent issued the final account to the appellant. The appellant applied for summary judgment pursuant to O 14 of the Rules of the High Court 1980. The appellant's application was allowed by the learned senior assistant registrar who gave judgment for the appellant. Being dissatisfied with that decision, the respondent appealed against the decision to the judge in chambers. The learned judge who heard the appeal allowed the respondent's appeal. The appellant then appealed against the decision of the learned judge.

Held, allowing the appeal:

(1) The parties had met several times to finalise the account after the issuance of

the certificate by the JKR. As such there was no excuse for the respondent to say that payment could not be paid because the respondent had not issued its final account due to the fact that the JKR had not issued the Certificate of Making Good Defects. The respondent did not produce any letter to show that it had written to the JKR to apply for the said Certificate of Making Good Defects. The respondent also did not produce any letter from the JKR to say that the defects were not rectified (see para 19).

(2) The affidavit evidence showed that the appellant had rectified all the defects as stated in the appellant's letters to the respondent. It is to be noted that the respondent did not respond to those letters. As such, the respondent's silence on this matter could be taken to mean that the respondent had agreed that the defective works had been rectified (see para 20).

(3) It would be unfair to the appellant to insist that further payments to the appellant could only be made after the JKR had issued the Certificate of Making Good Defects. It must be appreciated that the appellant's works under the letter of award with the respondent formed only a part of the works under the said project that the respondent had with the Government of Malaysia. There could be other reasons that led to the non-issuance of Certificate of Making Good Defects by the JKR. The respondent had not disclosed the reason for the withholding of the said Certificate of Making Good Defects or whether any effort had been made to secure its issuance (see para 21).

(4) The respondent's affidavit-in-reply did not contain any exhibits to substantiate any of the statements affirmed therein nor did it mention any amount of detail and quantification. In addition to that the respondent's defence and its affidavit-in-reply had not disclosed any counter claim or set-off. The only defence raised by the respondent was that there could be a possible set-off for possible defects and potential losses. The respondent was, however, unable to show that it had suffered any losses notwithstanding the fact that the defect liability period had expired. Under the circumstances, the respondent was unable to show that the amount claimed by the appellant was inaccurate (see para 24).

(5) From cl 8 of the letter of award it can be seen that the said Certificate of Making Good Defects, allegedly to be issued by JKR, was not even mentioned in the said clause. That clause clearly stated that half of the amount retained was to be released upon the issuance of the Certificate of Practical Completion, which has been issued by the JKR and the other half was to be released after the expiry of defect liability period or made good defect whichever is the later. The defects liability period in this case had expired and the appellant had rectified all the defective works by the same date. Under the circumstances, the respondent did not have any valid reason for not releasing the retention money to the appellant (see paras 26–27).

(6) The learned judge was wrong to impose the burden of proving the legality of that deduction on the appellant. No details of the deduction had been produced by the respondent despite the appellant's contention that it was unauthorized. The respondent had not shown that it had the right under the letter of award to make such deduction (see paras 29–30).

[Bahasa Malaysia summary

Responden adalah kontraktor utama sebuah projek ('projek tersebut'). Perayu telah dilantik oleh responden sebagai sub-kontraktor untuk kerja-kerja sub-kontrak berkaitan projek tersebut ('kerja sub-kontrak tersebut') menurut sepucuk surat award ('surat award tersebut'). Perayu menuntut terhadap responden untuk jumlah RM3,017,587.15 yang merupakan baki jumlah yang perlu dibayar dan terhutang oleh responden untuk semua kerja-kerja yang dijalankan dan diselesaikan, termasuklah jumlah RM435,161.64 yang merupakan wang tahanan dan sejumlah RM348,129.31 yang dikatakan 'potongan yang tidak sah' oleh responden. Perayu telah menyelesaikan kerja-kerja untuk kerja sub-kontrak tersebut dan satu sijil amalan penyiapan telah dikeluarkan oleh Pegawai Penguasa daripada Jabatan Kerja Raya ('JKR') untuk menunjukkan bahawa semua kerja untuk projek tersebut telah disiapkan. Perayu juga telah memperbaiki semua kerosakan yang dikenalpasti oleh responden. Perayu mengatakan bahawa akibat daripada rundingan itu perayu telah bersetuju terhadap jumlah muktamad sub-kontrak itu. Responden mempertikaikan tuntutan perayu dan menegaskan bahawa keseluruhan jumlah yang perlu dibayar kepada responden hanya boleh ditentukan selepas responden mengeluarkan penyata terakhir kepada perayu. Perayu telah memohon penghakiman terus menurut A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Permohonan perayu telah dibenarkan oleh penolong kanan pendaftar yang bijaksana yang memberikan penghakiman menyebelahi perayu. Berasa tidak puas hati dengan keputusan tersebut, responden telah merayu terhadap keputusan itu kepada hakim dalam kamar. Hakim bijaksana yang mendengar rayuan tersebut telah membenarkan rayuan responden. Perayu kemudian telah merayu terhadap keputusan hakim bijaksana itu.

Diputuskan, membenarkan rayuan tersebut:

(1) Pihak-pihak telah bertemu beberapa kali untuk menyelesaikan akaun selepas pengeluaran sijil tersebut oleh JKR. Oleh itu tiada alasan untuk responden mengatakan bahawa bayaran tidak boleh dibuat kerana responden tidak mengeluarkan penyata terakhir yang perlu dibayar di mana JKR tidak mengeluarkan Sijil Memperbaiki Kecacatan. Responden tidak mengemukakan sebarang surat untuk menunjukkan bahawa ia telah menulis kepada JKR memohon untuk Sijil Memperbaiki Kecacatan itu. Responden juga tidak mengemukakan sebarang surat daripada JKR untuk mengatakan bahawa kecacatan itu tidak diperbaiki (lihat perenggan 19).

(2) Keterangan afidavit menunjukkan bahawa perayu telah memperbaiki semua kecacatan seperti yang dinyatakan dalam surat-surat perayu kepada responden. Perlu ditekankan bahawa responden tidak menjawab surat-surat tersebut. Oleh itu, sikap berdiam diri responden berhubung perkara ini diertikan untuk bermaksud bahawa responden bersetuju bahawa kerja-kerja pembaikan kerosakan telah dilakukan (lihat perenggan 20).

(3) Adalah tidak adil terhadap perayu untuk mendesak bayaran seterusnya ke atasnya hanya boleh dibuat selepas JKR telah mengeluarkan Sijil Memperbaiki Kecacatan. Ia hendaklah difahami bahawa kerja-kerja perayu di bawah surat award tersebut dengan responden hanya membentuk

sebahagian daripada kerja-kerja di bawah projek tersebut yang mana responden peroleh dengan Kerajaan Malaysia. Terdapat alasan lain yang menyebabkan Sijil Memperbaiki Kecacatan tidak dikeluarkan oleh JKR. Responden tidak mengemukakan sebab Sijil Memperbaiki Kecacatan ditahan atau sama ada apa-apa usaha telahpun dibuat untuk menjalin pengeluarannya (lihat perenggan 21).

(4) Afidavit jawapan responden tidak mengandungi apa-apa ekshibit untuk menggantikan apa-apa kenyataan yang disahkan maupun tidak disebutkan apa-apa jumlah tentang butiran dan kuantiti. Bahkan dalam pembelaan responden dan afidavit jawapannya tidak menunjukkan apa-apa tuntutan balas atau penepian. Satu-satunya pembelaan yang ditimbulkan oleh responden adalah bahawa terdapat kemungkinan penepian untuk kecacatan yang mungkin dan kerugian yang mungkin. Responden bagaimanapun tidak dapat menunjukkan bahawa ia mengalami apa-apa kerugian meskipun tempoh liabiliti kecacatan telah luput. Dalam keadaan sedemikian, responden tidak dapat menunjukkan bahawa jumlah yang didakwa oleh perayu itu adalah tidak tepat (lihat perenggan 24).

(5) Berdasarkan kl 8 kepada surat award itu dapat dilihat bahawa Sijil Memperbaiki Kecacatan, yang dikatakan telah dikeluarkan oleh JKR, tidak disebutpun dalam klausa itu. Klausa itu jelas menyatakan bahawa separuh daripada jumlah yang ditahan akan dilepaskan selepas pengeluaran Sijil Memperbaiki Kecacatan, yang telah dikeluarkan oleh JKR dan separuh lagi akan dilepaskan setelah tamat tempoh liabiliti kecacatan atau memperbaiki kecacatan yang mana terkemudian. Tempoh liabiliti kecacatan dalam kes ini telah tamat dan perayu telahpun memperbaiki semua kerja memperbaiki kecacatan sebelum tarikh itu. Dalam keadaan sedemikian, responden tiada alasan sah untuk tidak melepaskan wang tahanan itu kepada perayu (lihat perenggan 26–27).

(6) Hakim bijaksana terkhilaf kerana meletakkan beban pembuktian kesahan potongan tersebut ke atas perayu. Tiada butiran tentang potongan itu telah dikemukakan oleh responden meskipun perayu berhujah bahawa ia tidak sah. Responden tidak menunjukkan bahawa ia mempunyai hak di bawah surat award tersebut untuk membuat potongan sedemikian (lihat perenggan 29–30).]

Notes

For cases on appeal of summary judgment, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6070–6188.

For cases on claims for work done, see 3(2) *Mallal's Digest* (4 th Ed, 2003 Reissue) paras 2445–2453.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Ellis Mechanical Services Ltd v Wales Construction Ltd [1978] 1 Lloyd's Rep 33 (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300 (refd)

Neale v Richadson [1938] 1 All ER 753 (refd)

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (refd)
Tharsis Sulphur and Cooper Co v M' Elroy & Sons (1878) 3 App Cas (refd)
Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241 (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283 (refd)

Legislation referred to
Rules of the High Court 1980 O 14 r 3

Appeal from: Suit No S6–22–861 of 2004 (High Court, Kuala Lumpur)

Oon Chee Kheng (Doris Chong with him) (CK Oon & Co) for the appellant.
Ahmad Hafez bin Zaidi (Tengku Naufal & Co) for the respondent.

Hasan Lah JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant applied by way of summons in chambers dated 30 July 2004 for summary judgment pursuant to O 14 of the Rules of the High Court 1980. The appellant's application was allowed by the learned senior assistant registrar who gave judgment for the appellant for:

(a) the sum of RM3,017,587.15;

(b) interest at the rate of 8% per annum on the sum of RM3,017,587.15 from the date of the order till the date of full realization; and

(c) costs.

[2] Being dissatisfied with that decision, the respondent appealed against the decision to the judge in chambers. The learned judge who heard the appeal allowed the respondent's appeal. The appellant then appealed against the decision of the learned judge. On 10 October 2006, we heard this appeal and by a unanimous decision we allowed the appeal with costs.

FACTS OF THE CASE

[3] The respondent was the main contractor of a project known as 'Cadangan Membina Kolej Matrikulasi Perak Di Atas Sebahagian Dari Lot 137664, Mukim Teja, Daerah Kinta Untuk Kementerian Pendidikan Malaysia' ('the said project'). The appellant was appointed by the respondent as a sub-contractor for RC Work, Brickwork, Plastering, Screeding and Perimeter Drain ('the sub-contract works') in relation to the said project pursuant to a letter of award dated 14 May 2001.

[4] By this action, the appellant claimed against the respondent for the sum of RM3,017,587.15 being the outstanding amount due and owing by the respondent for all the works done and completed, inclusive of the sum of RM435,161.64 being

the retention monies and the sum of RM348,129.31 being the so-called 'unauthorized deduction' by the respondent. A

[5] The appellant had completed the works for the sub-contract works and a certificate of practical completion had been issued by the Superintending Officer from Jabatan Kerja Raya ('JKR') to the effect that all works for the said project had been completed on 28 February 2002. The appellant had also rectified all the defects identified by the respondent. B

[6] In the appellant's amended statement of claim dated 26 July 2004 the appellant said that the respondent had agreed that the revised sub-contract sum as stated in the progress payment certificates Nos 12(a) and 12(d) which were issued by the respondent in February 2003 and December 2003 respectively was RM17,406,465.49. The appellant further alleged that the parties had several negotiations after the appellant, through its solicitor, sent a notice of demand to the respondent. The appellant alleged that as a result of the negotiations the appellant had agreed that the final sub contract sum was RM17,943,157.06. C D

[7] In paragraph 26 of the appellant's affidavit in support the appellant explained how the claim for RM3,017,587.15 was arrived at. Based on the said sub-contract sum of RM17,943,157.06, the appellant deducted an amount of RM11,300,000 which had already been paid by the respondent to the appellant and an amount of RM3,625,569.91 in the form of contra and back charges which had been agreed upon by the appellant. Hence, the amount remained unpaid for the works done was RM3,017,587.15 which was made up of the following figures: E

(a) RM435,161.64 for retention money; F

(b) RM348,129.31 for unauthorized deductions; and

(c) RM2,243,296.20 for the works done and not paid.

[8] The respondent disputed the appellant's claim and contended that the total amount to be paid to the respondent could only be ascertained after the respondent issued the final account to the appellant. G

FINDINGS OF THE HIGH COURT

[9] The learned judge of the High Court held that the respondent has raised bona fide triable issues in this case for the following reasons: H

(a) The amount stated in the appellant's final account statement was disputed by the respondent.

(b) The respondent's progress payment certificates should not be regarded as final. The respondent's progress payment certificates no. 12(a) and 12(d) which were exhibited as exh 'TBT-8' of encl 5 contained a clause which stated that the sum of RM17,406,465.49 shall not be taken as conclusive and final amount which would form the basis of the appellant's claim against the respondent. As such the appellant's claim should be regarded as premature and baseless. I

(c) The final statement of account has yet to be issued by the respondent. The final amount payable to the appellant could only be determined upon issuance of the final account by the respondent.

(d) The retention sum shall only be released upon issuance of the Certificate of Making Good Defects by the JKR.

(e) Under cl 14.0 of the letter of award the respondent had a contractual right to deduct from the retention money.

(f) The appellant has failed to produce any documentary evidence to support the allegation of 'unauthorized deduction' by the respondent.

DECISION OF THE COURT OF APPEAL

[10] Order 14 of the Rules of the High Court 1980 provides an efficacious and expeditious procedure for disposal of an action where the defence is clearly unsustainable in law or on the facts. In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, the Federal Court has laid down the following guideline at pp 301–302:

> ... We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are (1) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14 the preliminary requirements are:
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> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.
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> It is to be observed that a case is not within O 14 (a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ includes a claim or claims outside the scope of O 14 as coming within r 1(2); (c) where the affidavit in support of the application is defective, eg in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates; (d) where the application is made in an action against the Government [O 73 r 5(1)].
>
> If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him [see O 14 rr 3 and 4(1)].

[11] In accordance with O 14 r 3 all the respondent needs to show is that there is a triable issue as to a matter of fact or any real difficulty as to a matter of law. In *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241, Salleh Abas FJ has said that it is not enough for the respondent in answer to the appellants' application to sign final judgment to raise an issue or any issue. The respondent must raise such issue as would require a trial in order to determine it or in other words, the issue raised must be an arguable issue. With these basic principles in mind we will now deal with the issues raised by the respondent in opposing the appellant's application.

PROGRESS PAYMENT CERTIFICATES

[12] From the affidavit evidence it is clear that the appellant's claim was based upon the progress payment certificates which were produced as exhibit 'TBT-8' in the appellant's affidavit-in-support. The summary of payments received is shown in exh 'TBT-12'. The last progress payment certificate, ie payment No 12(d), was issued in December 2003 whereby it was stated that the revised sub-contract sum (provisional subject to final confirmation) was RM17,406,465.49. Based on this revised sub-contract sum several negotiations were held between the appellant and the respondents as stated by the appellant's director Tan Boon Tuan, in para 21 of his affidavit-in-support, and it was finally agreed by the appellant that the final sub-contract sum was RM17,943,157.06. It was alleged that in those negotiations the respondent was represented by Ms Jenny Tan. Subsequent to that Mr Tan Boon Tuan, on behalf of the appellant, sent a letter dated 1 June 2004 to the respondent to confirm what had been agreed upon in those negotiations. That letter was produced as exh 'TBT-11' in the appellant's affidavit.

[13] In their arguments in the High Court and also in their written submissions submitted to this court for this appeal the parties have touched on the legal status of an interim certificate and/or progress payment certificates as far as building construction contracts are concerned. Relying on the decision of the Federal Court in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, the learned counsel for the appellant contended that such payment certificates when issued acquired 'temporary finality' and payment must be honoured save for permissible contractual deductions. As such the learned High Court judge's conclusion that since payment certificates issued by the respondent were not final the appellant's claim was premature and baseless was flawed in law.

[14] The learned counsel for the appellant also cited the case of *Neale v Richadson* [1938] 1 All ER 753 where the English Court of Appeal held that the lack of a certificate was no bar to the plaintiffs right to recover the balance of money due.

[15] On this issue the learned counsel for the respondent contended that the respondent's progress payment shall not be regarded as final. As such the appellant could not use the amount stated therein as the basis for the appellant's claim against the respondent. The learned counsel for the respondent referred to the progress payment certificate Nos 12 (a) and 12(d) which were exhibited as 'TBT-8' of the appellant's affidavit-in-support which stated that the sub-contract sum shall be RM17,406,465.49. According to the learned counsel it was provided therein that the said amount of RM17,406,465.49 shall not be taken as conclusive and final and form the basis of their claim against the respondent. There is a phrase 'provisional subject to final confirmation' printed next to the amount and there is a proviso at the bottom of the certificate stating that 'All quantities/workdone are provisional and subject to final remeasurement — Final Account'.

[16] To support his contention that the progress payment certificates are provisional and shall never be regarded as final and conclusive the learned counsel for the respondent cited para 40.082 from *Halsbury's Laws of Malaysia* Vol 3, Building

and Construction Revenue (1999) and a passage from the judgment of Lord Hartherley LC in *Tharsis Sulphur and Cooper Co v M' Elroy & Sons* (1878) 3 App Cas 1040. The learned counsel also submitted that the cases cited by the learned counsel for the appellant could be distinguished on their facts. According to the learned counsel for the respondent the facts in *Neale v Richadson* show that the inordinate delay done by the architect was without justifiable cause or reason whereas in the present case the duty to issue the final statement of account is vested with the respondent and the respondent had explained the reasons and circumstances which led to the delay on the issuance of the said document, ie the JKR had not issued the Certificate of Making Good Defects.

[17] With regard to *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd*, the learned counsel contended that that case can be distinguished on the follow grounds:

(a) The finality of amount stated in the said penultimate certificate in that case was not disputed as in this case;

(b) The employer in that case had waived their right to challenge the liability to pay the amount stated under the said interim certificate when they failed to refer the matter to arbitration;

(c) The duty to issue the interim progress certificate in that case was given to the architect; and

(d) In that case there was no dispute pertaining to any defect liability period (apart from the issues of defective materials and workmanship) and further no issue of rectification had been disputed rendering the amount stated under the said interim certificate as valid amount payable to the contractor.

[18] In *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd*, Edgar Joseph Jr FCJ said at p 81 that:

> However, there are certain general observations we should like to add by way of postscript.
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> When, upon the proper construction of a particular contract which, of course, is a question of law, there is no obligation on the part of an employer in a main contract, or a main contractor in a sub-contract, to pay upon being served with a progress payment certificate, because of pending disputes, allegations of defects in works or, materials or claims for damages for delay, without giving some reasonable amount of detail and quantification, are unlikely to result in the dismissal of an application for summary judgment under O 14 and leave to defend being given (see *Kilby & Gayford Ltd v Selincourt Ltd* (1973) 229 EG 1343, CA).
>
> As for the degree of proof required of a plaintiff builder in O 14 proceedings based upon an interim certificate issued by an architect or engineer pursuant to a construction contract, this has been variously described in *Ellis Mechanical Services Ltd v Wales Construction Ltd* [1978] 1 Lloyd's Rep 33 as 'indisputably due' (per Denning MR at p 35), 'as plain as could be' (per Denning MR at p 36) or 'beyond reasonable doubt' (per Bridge LJ at p 37). In his book *Keating on Building Contracts* (4th Ed), Mr Donald Keating QC, under the sub-heading 'Evidence supporting application for summary judgment', at p 279 says this:
>
> > Every case turns upon its facts but excellent evidence is either an admission by the defendant, or his authorized agent, or a certificate by the defendant's architect or engineer,

> which is a special and formal kind of admission. When evidence of this nature is established the court usually requires cogent evidence from the defendant before it grants leave to defend. Thus merely to allege the existence of defects in the works, or a claim for damages for delay without in each case giving some reasonable amount of detail and of quantification is unlikely to result in leave to defend.

[19] It is accepted that the amount stated in the progress payment certificate No 12(d) is provisional and subject to final confirmation. However, the parties had met several times to finalise the account after the issuance of that certificate. This was clearly stated in the appellant's letter dated 1 June 2004, ie exh 'TBT-11'. As such there was no excuse for the respondent to say that payment could not be paid because the respondent had not issued its final account due to the fact that the JKR has not issued the Certificate of Making Good Defects. The respondent did not produce any letter to show that it had written to the JKR to apply for the said Certificate of Making Good Defects. The respondent also did not produce any letter from the JKR to say that the defects were not rectified.

[20] The affidavit evidence shows that the appellant had rectified all the defects as stated in the appellant's letter to the respondent dated 26 February 2004, ie exh 'TBT-4'. In that letter the appellant said:

> Further to your memo dated 10th February 2004, we confirm that defects due to our works is now completed. Attached are the verification by your site representative Encik Sazaly Mustakim conforming the repair works completed.

Another letter dated 23 March 2004 was sent by the appellant to the respondent regarding the matter wherein the appellant said:

> We are please to inform you that the defects which is due to our works is now rectified already. Your site representative, Encik Sazaly have signed and witness the repair.

It is to be noted that the respondent did not respond to those letters. As such, the respondent's silence on this matter could be taken to mean that the respondent had agreed that the defective works have been rectified. In *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 at p 288, Gopal Sri Ram JCA said:

> During argument, we registered our surprise at the learned judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December 1991. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.

[21] Furthermore, it would be unfair to the appellant to insist that further payments to the appellant could only be made after the JKR had issued the Certificate of Making Good Defects. It must be appreciated that the appellant's works under the contract with the respondent formed only a part of the works under the said Project that the respondent had with the Government of Malaysia (JKR). There could be other reasons that led to the non-issuance of Certificate of Making Good Defects by the JKR. The respondent, in its affidavit-in-reply, had not disclosed the reason for the withholding of the said certificate or whether any effort had been made to secure its issuance.

[22] It is also important to note that the JKR had issued the Certificate of Completion of the works on 28 February 2002 and the defects liability period expired on 28 February 2004. By that time the appellant had rectified the defective works. At the time of the hearing of this appeal which was about 32 months after the expiry of the defects liability period there was no evidence to show that the Certificate of Making Good Defects had been issued by the JKR.

[23] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, Mohamed Azmi SCJ said at p 408 of the judgment:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially under an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable.

[24] In our view, the learned judge has erred in failing to appreciate the issues at hand and consider them in their proper prospective. It is also important to note that the respondent's affidavit-in-reply did not contain any exhibits to substantiate any of the statements affirmed therein nor did it mention any amount of detail and quantification. In addition to that, the respondent's defence and its affidavit-in-reply had not disclosed any counter claim or set-off. The only defence raised by the respondent was that there could be a possible set-off for possible defects and potential losses. The respondent was, however, unable to show that it had suffered any losses notwithstanding the fact that the defect liability period had expired on 28 February 2004. Under the circumstances we were of the view that the respondent was unable to show that the amount claimed by the appellant was inaccurate. In spite of all these the learned judge failed to take heed the advice given by Lawton LJ in *Ellis Mechanical Services Ltd v Wales Construction Ltd* [1978] 1 Lloyd's Rep 33 at p 36:

> If the main contractor can turn round, as the main contractor has done in this case, and say 'Well, I don't accept your account; therefore there is a dispute', that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties; he is deprived of his commercial lifeblood. It seems to me that the administration of justice in our Courts should do all it can to restore that lifeblood as quickly as possible.

RELEASE OF RETENTION MONEY

[25] Clause 8.0 of the letter of award states:

> 8.0 Retention Sum
>
> 8.1 A retention sum of 10% of the value certified and/or up to maximum of 5% of contract value, shall be deducted from the value of work done in all interim payment. This retention shall be imposed through out the contract period.

8.2 The retention money shall be released to you in two (2) moieties. The 1st moiety shall become due and payable upon issuance of Certificate of Practical Completion by the client. The 2nd moiety shall be released after the expiry of defect liability period and or made good defect which ever is the later.

[26] From a reading of that cl 8 it can be seen that the so-called Certificate of Making Good Defects, allegedly to be issued by JKR, is not even mentioned in the said clause. That clause clearly states that half of the amount retained was to be released upon the issuance of the Certificate of Practical Completion (which was issued by the JKR on 28 February 2002) and the other half was to be released after the expiry of defect liability period or made good defect whichever is the later. The defects liability period in this case expired on 28 February 2004 and the appellant had rectified all the defective works by the same date.

[27] Under the circumstances we were of the view that the respondent did not have any valid reason for not releasing the retention money to the appellant.

REFUND OF UNAUTHORIZED DEDUCTIONS

[28] The learned judge has in his Grounds of Judgment said that the appellant had failed to specify the details of the unauthorized deductions and had also failed to produce any documentary evidence to support the allegation of such unauthorized deduction by the respondent. With deepest respect that evidence could be seen in the Progress Payment Certificate 12(d) i.e. the last progress payment certificate issued by the respondent to the appellant where the following deduction was indicated to have been made:

2. MAINTENANCE @ 2% RM348.129.31.

[29] It must be appreciated that this deduction was made by the respondent and shown in the certificate issued by the respondent. It is therefore surprising that the learned judge has imposed the burden of proving the legality of that deduction on the appellant. No details of the deduction had been produced by the respondent despite the appellant's contention that it was unauthorized.

[30] It was the appellant's contention that the deduction was unauthorized as there was no term in the letter of award allowing for such deduction '@ 2%' to be made. It is also to be observed that such deduction started only from Progress Payment No 11(a) and through to Progress Payment Certificate No 12(d). Prior to that there was no such deduction made. The respondent has not shown that it had the right under the agreement to make such deduction.

CONCLUSION

[31] In the light of the foregoing we were not satisfied that the decision of the learned judge could be upheld. Accordingly we allowed the appeal with costs here

and below and set aside the order of the learned judge. An order in terms of the appellant's application in the summons in chambers dated 30 July 2004 was made.

Appeal allowed.

Reported by Peter Ling